Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

DEER PARK INDEPENDENT SCHOOL DISTRICT, GALENA PARK INDEPENDENT SCHOOL DISTRICT and SHELDON INDEPENDENT SCHOOL DISTRICT,

Petitioners,

vs.

HARRIS COUNTY APPRAISAL DISTRICT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress, in exercising its power under the Commerce Clause, may prohibit a State and/or its political subdivisions from levying a non-discriminatory tax on persons or property located within its jurisdiction when that tax violates neither the prohibitions of the Import/Export clause nor the dormant protections of the Commerce Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Shell Chemical Corporation, Shell Oil Company, Marubeni Tubulars Incorporated, Mitsui Tubular Products Incorporated, Lyondell-Citgo Refining Company Limited, Crown Central Petroleum Corporation, Vinson Supply Company and Siderca Corporation were parties before the Court of Appeals and Respondents herein.

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Petitioners, the Deer Park, Galena Park and Sheldon Independent School Districts (the "School Districts") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Deer Park Ind. Sch. Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095 (5th Cir. 1998). (Appendix A). The opinion of the District Court in *Deer Park Ind. Sch. Dist. v. Harris County Appraisal Dist.*, is reported at 963 F. Supp. 605 (S.D. Tex. 1997). (Appendix B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 22, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

28 U.S.C. § 2403(a) (1990) may apply to this case and Petitioners find no indication in the record that the courts below certified to the Attorney General of the United States that the constitutionality of an Act of Congress has been drawn into question.

In accordance with Rule 29, Section 4(b), Rules of the Supreme Court and 28 U.S.C. § 2403(a) (1990) this Petition for a Writ of Certiorari is being served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 reads in relevant part as follows:

> The Congress shall have the power . . . To regulate Commerce with foreign nations, and among the several states, and with the Indian tribes . . .

U.S. CONST. art. I, § 8.

Article I, § 10, Clause 2 reads as follows:

> No state shall without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States: and all such laws shall be subject to revision and control of the Congress.

U.S. CONST. art. I, § 10, cl. 2.

Amendment X reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

Section 81*o*(e) reads as follows:

> (e) Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes, shall be exempt from State and local ad valorem taxation.

19 U.S.C. § 81*o*(e) (Supp. 1997).

STATEMENT OF THE CASE

The fundamental question in this case is whether the indispensable and essential power of a State to levy non-discriminatory taxes on persons and property within its jurisdiction may be abrogated by Congress under the guise of regulating commerce. While the tax in question in this instance is an ad valorem (property) tax, Petitioners can see no distinction in principle which would prevent Congress from prohibiting a state from levying any type of tax if the statute being challenged here is a valid exercise of Congressional authority. Indeed, if Congress may prohibit a State or its political subdivisions from levying a tax merely because it has some impact on commerce it is impossible to envision any source of revenue which is secure to the States and beyond the reach of Congress.

A. Nomenclature, Record References and Emphasis Added

Throughout this Petition the Petitioners, Deer Park Independent School District, Galena Park Independent School

District, and Sheldon Independent School District, will be referred to collectively as "the School Districts". The Respondents which have a financial interest in the outcome of this case are eight corporations which will be referred to as the "Industries". The remaining Respondent is the Harris County Appraisal District, which does not have a financial interest in this case but which is a necessary party. It will be referred to infrequently as "HCAD".

References to the record shall be through the document number appearing on the district court docket sheet, followed by the internal page number in the document where the specific text being referenced appears, such as "Doc. 9, p. 6".

All emphasis added herein is ours unless otherwise indicated.

B. Statement of Facts

The School Districts filed suit in the court below on September 30, 1996, seeking a declaratory judgment that 19 U.S.C. § 81*o*(e) is unconstitutional. The United States District Court for the Southern District of Texas had jurisdiction under 28 U.S.C. § 1331 (1986). The United States Court of Appeals for the Fifth Circuit had jurisdiction under 28 U.S.C. § 1291 (1986). For purposes of ad valorem taxation for 1995 and 1996, HCAD had granted an exemption from taxation for certain tangible personal property owned by the Industries which was located within the taxing jurisdictions of the School Districts on January 1, of 1995 and 1996. The exemption was granted due to the provisions of § 81*o*(e).

Specifically, Deer Park I.S.D. alleged that the exemption granted to the general industrial property belonging to Shell Chemical Corporation was depriving it of tax revenues of

$3,483,420.16. (Doc. 1, pp. 4-5). Galena Park I.S.D. alleged that the exemptions granted to the pipe inventory of Marubeni Tubulars, Inc. and of Mitsui Tubular Products, Inc., and to the inventory and general industrial property belonging to Shell Oil Company, to Lyondell-Citgo Refining Co., Ltd., and to Crown Central Petroleum Corporation were depriving it of tax revenues estimated at $557,254.50. (Doc. 1, pp. 5-7). Sheldon I.S.D. made similar allegations about its loss of tax revenue from the pipestock inventories of Marubeni Tubulars, Inc., Vinson Supply Company and Siderca Corporation, estimated to total $82,415.61. (Doc. 1, pp. 7-9).

At the direction of the District Court, each party except HCAD filed a brief Data Sheet. Those of the Industries contain short descriptions of their business activities within each Foreign Trade Zone in which the School Districts seek to tax property. (Docs. 34, 35, 36, 37, 38, 40, 42, 44). For example, Shell Chemical Corporation processes, manufactures and stores various chemical products (Doc. 34), while Shell Oil Company processes, manufactures and stores products such as gasoline, jet fuel and heating oil. (Doc. 35). Neither of those parties indicated the locations of the customers for their products. Crown Central Petroleum Corporation produces gasoline, jet fuel and heating oil, and identified its market for its refined products as being local. (Doc. 36). Lyondell-Citgo Refining Company, Ltd. does no refining in a Foreign Trade Zone. Rather it stores imported crude oil in the zone before moving it to its refinery, which is outside the zone. The location of its market was not stated. (Doc. 38). The remaining Industries all brought pipestock or other tubular goods into the Foreign Trade Zones and did no significant processing of alterations on the pipe while in the zone. (Docs. 37, 40, 42 and 44). Siderca Corporation and Vinson Supply Company specifically stated that the pipe which they import into the zones was eventually to be exported to foreign destinations.

In the data sheets filed by the School Districts they stated their size, student populations, campuses, values of taxable property after exemptions listed by categories, tax rates, tax levies, and top 10 taxpayers and their taxable values. All of the Data Sheets were incorporated by reference into ten stipulations of facts. (Doc.45). The School Districts believe that the following stipulations are most critical to this case:

> 9. All or a significant portion of the property involved in this dispute would be taxable by the [School Districts] were it not for the exemption created by the provisions of 19 U.S.C. §81*o*(e).
>
> 10. The property involved in this dispute is exempt from taxation by the [School Districts] unless the provisions of 19 U.S.C. §81*o*(e) are unconstitutional.

(*See* Appendix C, p. 24a).

C. Background of This Case

The basic issue in this case arises from a 1984 amendment to the Foreign Trade Zones Act of 1934, 19 U.S.C. § 81a (Supp. 1997), *et seq*. The School Districts think it is uncontested that the original purpose of the Act when it became law was to encourage economic growth through increased manufacturing and employment. That goal was accomplished by allowing imported goods into this country and delaying the payment of any tariffs or customs duties until those goods left the "Foreign Trade Zone" and eliminating such tariffs or duties on imports that were re-exported from such zones. For fifty years the purposes for creating such zones were served by the Federal Government foregoing **its own** sources of revenue. In 1984, however, the Act was amended by the addition of § 81*o*(e) which is set forth above.

With respect to the law of Texas, it is clear that under both the Constitution and the statutes all property situated in this State on the assessment date is to be taxed, unless an exemption is authorized by the Texas Constitution or is imposed by some overriding protection or prohibition in the United States Constitution. TEX. CONST. art. VIII, §§ 1, 2 and 11; *Greyhound Lines, Inc. v. Board of Equalization of Fort Worth*, 419 S.W. 2d 345 (Tex. 1967); *Aransas County Appraisal Review Bd. v. Texas Gulf Shrimp Co.*, 707 S.W. 2d 186 (Tex. App. — Corpus Christi, 1986, *writ ref'd n.r.e.*). Article VIII, § 1 of the Texas Constitution for example, reads in part as follows:

> **Article VIII, Sec. 1. Equality and Uniformity; Tax in Proportion to Value; Occupation Taxes; Income Tax; Exemption of Certain Tangible Personal Property from Ad Valorem Taxation.**
>
> (a) Taxation shall be equal and uniform.
>
> (b) All real property and tangible personal property in this State unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.

TEX. CONST. art. VIII, § 1.

The legislative history of § 81*o*(e) leaves no doubt that it was aimed specifically at overriding this and other provisions of the Texas Constitution that all property be taxed equally.

Reason for provision — **Local taxing jurisdictions in Texas may seek to declare exemptions for property taxes on some tangible**

> **personal property stored in foreign trade zones, but are precluded from doing so by the Texas Constitution.** The local foreign trade zones thus are disadvantaged in promoting the benefits of zones in their localities. The committee is unaware of any states or localities outside the State of Texas that seek to impose property taxes on tangible personal property located in foreign trade zones for bona fide customs reasons, or have a bar similar to that in Texas that would preclude localities from declaring an exemption to such a tax.

Legislative History for P.L. 98-573, U.S. Trade and Tariff Act of 1984 — 1984 U.S.C.C.A.N. 4910, 4945-4946.

Perhaps most illustrative of the invasive effect of 19 U.S.C. § 81*o*(e) appears from a consideration of the fact that a substantial portion of the property involved in this case is crude oil destined to be refined in Texas and the products resulting from the refining process. This property is indistinguishable in any way, other than its location in a Foreign Trade Zone, from the crude oil which the Texas Supreme Court found to be taxable in *Diamond Shamrock Ref. and Mktg. v. Nueces County Appraisal Dist.*, 876 S.W. 2d 298 (Tex. 1994), *cert. denied*, 130 L. Ed. 2d 409, 115 S. Ct. 500 (1994).

Instead of bearing their fair share of the tax burden imposed to educate the children residing in the School Districts, the Industries enjoyed an exemption from taxation on millions of dollars worth of property, and, presumably, were able to benefit from a cost advantage not enjoyed by their competitors whose property was located outside of a Foreign Trade Zone.

Since the passage of § 81*o*(e) the School Districts and other political subdivisions in Texas have found themselves precluded

from taxing property such as that owned by the Industries involved in this case simply because the property was located in a "Foreign Trade Zone", while at the same time levying taxes on property indistinguishable in nature from that owned by the Industries but located outside of such zones.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE ESSENTIAL AND INDISPENSABLE POWERS OF TAXATION RESERVED TO THE STATES BY THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The tax exemption authorized by § 81*o*(e) is an exemption from a non-discriminatory property tax. That tax is a primary source of revenue for cities, counties, school districts and many other types of political subdivisions in Texas. If there is any constitutional basis for the exemption authorized by § 81*o*(e) it must arise from the provisions of the Commerce Clause of the U.S. Constitution (U.S. CONST. art. I, § 8) or from the express prohibitions found in the Import-Export Clause (U.S. CONST. art. I, § 10, cl. 2) which are set forth above.

The stipulations entered by the parties to this cause make it clear that with respect to most, if not all, of the property exempted in this cause, neither the protections from taxation afforded to commerce by the Commerce Clause nor the express prohibitions found in the Import-Export Clause are violated by the tax in question here. (*See* Appendix C, p. 24a, no. 9) By agreeing that most if not all of the property would be taxable but for the existence of § 81*o*(e), the Industries have waived

any argument that the tax in question is in the nature of a duty or impost (*Michelin*) or that it does not meet the test set forth in *Complete Auto*, that it (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the state. *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

That the power to levy a non-discriminatory tax was reserved to the states by the Tenth Amendment is so clearly in the affirmative as to be indisputable. The foundation upon which almost all jurisprudence dealing with the powers of the national government versus the state governments is built is *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

In that case Chief Justice Marshall and this Court went to great lengths to define the balance between the powers which the adoption of the United States Constitution had ceded to the national government and those which had been reserved to the States. In this respect Marshall wrote as follows:

> That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied . . .

Id. at 425.

> . . . It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to

> the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.
>
> The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative to guard them against its abuse . . .

Id. at 428.

> **This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.** But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

Id. at 436-437.

In the last paragraph above, this Court went out of its way to make it clear that non-discriminatory state taxes against property or people within the State were not the evil being addressed in the case and that those forms of taxation were available to the states before the adoption of the United States Constitution and retained by them after its adoption.

What Chief Justice Marshall and this Court found objectionable was the levying of a tax by Maryland on the operation of the Bank of the United States. After determining that Congress had the power to incorporate a national bank this Court found that such a tax was repugnant to that power. This Court repeatedly stated that the power to tax was the power to destroy, but in almost the same breath reflected that the power to tax was essential to the states. It is clear that what this Court condemned was a tax focused on an essential institution of the Federal Government and not on taxes which were general and non-discriminatory in nature and levied on people or property within the State. In the latter instance the self interest of state legislatures and their constituents would serve to prevent such taxes from being instruments of destruction.

What Chief Justice Marshall and this Court really sought to condemn was a tax which was "repugnant" to the proper exercise of Federal functions authorized by the United States Constitution. In the instant cause the question is whether the tax in question is in fact repugnant to the purposes of the Commerce Clause or the Import-Export clause of the Constitution. The School Districts urge that this Court has made it clear that the tax in question is not repugnant to those provisions.

> It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. "**It was not the**

> **purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."**

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108 (1974). *Complete Auto Transit,* 430 U.S. at 288.

> To be sure, allowance of nondiscriminatory ad valorem property taxation may increase the cost of goods purchased by "inland" consumers. **But as already noted, such taxation is the quid pro quo for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. A nondiscriminatory ad valorem property tax obviously stands on a different footing, . . .**

Michelin Tire Corp., 423 U.S. at 289-290.

If, as indicated above, neither the Commerce Clause nor the Import-Export clause were intended to prevent those

engaged in commerce from paying their way, how can a tax which extracts that payment be repugnant to either? One might urge that *McCulloch* was just the first significant step made by this Court in defining what powers had been granted the Federal Government by the Constitution and that subsequent opinions served to expand Federal authority at the expense of the states. Indeed, in the significant Commerce Clause case, *Gibbons v. Ogden*, 9 Wheat. 1 (1824), one finds the often cited language which reads as follows:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

Id. at 196-197.

This language has been the cornerstone of literally thousands of actions both legislative and judicial which have served to expand federal powers under the Commerce Clause to almost limitless bounds. In *Gibbons v. Ogden* this Court, however, acknowledged the existence of limits in almost the next breath with the following:

> The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time . . . Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion

> of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other.

Id. at 199.

At least within the sphere of states taxing their people and property, this Court found no conflict between this retained power and the authority granted to Congress under the Commerce Clause. In *Brown v. Maryland*, 12 Wheat. 419 (1827) this court similarly found no conflict between such state taxation and the Import-Export Clause, at least as to properties which had become part of the general mass of property in the state (as has all or most of the property involved in this cause).

> The constitutional prohibition on the states to lay a duty on imports — a prohibition which a vast majority of them must feel an interest in preserving — may certainly come in conflict with their acknowledged power to tax persons and property within their territory . . . It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

Id. at 441-442.

It is hard to imagine a broader list of actions which a property owner might take to mix up his property with the "mass of property in the country" than the laundry list included in § 81*o*(e). The property in question is not simply passing through Texas but rather has come to rest in Texas for the business purposes of the Industries, including manufacturing, refining, processing, and storage. It is impossible to distinguish the property owned by the Industries from any other manufacturer's inventory of raw materials or finished goods located anywhere else in Texas.

This Court's opinion in *Lane Co. v. Oregon*, 74 U.S. 101 (1869) directly addresses the issue in this case. In that case, this Court held as follows:

> **Now, to the existence of the States, themselves, necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the Colonies; and when the Colonies became States, both before and after the formation of the Confederation, it was exercised by the new governments** . . . The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the National Government, and subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect, and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports or imports, except for a single purpose and to an insignificant extent or to lay any duty on tonnage, was permitted to the States. **In respect, however, to property, business and persons, within their respective limits, their power**

> **of taxation remained and remains entire.** It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the Legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that is must not be so used as to burden or embarrass the operations of the National Government. **There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation.** To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress.

Id. at 104-105.

Since *Lane Co.* has been cited favorably by several recent opinions of this Court one would expect its holding to have been binding on the Court below. *See New York v. United States*, 505 U.S. 144 (1992), and *Prinz, Sheriff/Coroner, Ravalli County, Mont. v. United States*, __ U.S. __, 117 S. Ct. 2365, 2376 (1997). If it is correct that "There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation" then § 81*o*(e) is unconstitutional. It is inconceivable that a more direct abridgement of the power of a state and/or its political subdivisions to tax property within their jurisdiction could exist than a statute such as § 81*o*(e).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW EFFECTIVELY RENDERS THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION MEANINGLESS.

If, as this Court has repeatedly held, the power of the States to tax persons or property within their boundaries is essential and indispensable to their sovereignty, then a conflicting power in the Federal Government to prohibit such taxation means that State sovereignty exists only at the pleasure of the Federal Government. Such sovereignty is an illusion.

The court below based its opinion on its conclusion that when Congress is exercising its authority under the Commerce Clause the only test that must be met is

> 1) whether a rational basis exists for finding that the regulated activity affects interstate commerce, and 2) whether the means chosen by Congress were reasonably adapted to the end permitted by the Constitution.

(*See* Appendix A, page 5.) If general non-discriminatory state taxation is an activity that is subject to regulation by Congress then it would have to be conceded that any state tax (income, sales, property, *etc.*) would meet the first part of that two-pronged test. The more significant question is whether protection of commerce from a general non-discriminatory state tax is an end "permitted by the Constitution". If it is, then all state taxes are subject to Congressional control because they all "affect interstate commerce". The "affect" of the tax in question here is no different on property outside a Foreign Trade Zone than inside. Can Congress therefore designate the entire State of Texas

as a Foreign Trade Zone and prohibit taxation on all manufacturing inventories?

The very existence of § 81*o*(e) (to say nothing of the stipulation between the parties that most if not all of the exempted property would be taxable but for that section) proves that its purpose is to prohibit Texas and/or its political subdivisions from doing what they previously had the right to do, namely, taxing the subject property. The School Districts would urge that the tax in dispute here has no impact on commerce different from any tax levied by any State or local government. Does a property tax levied in Texas on property located in a "Foreign Trade Zone" have any different impact on commerce than an income tax levied in New York on companies that own property in a "Foreign Trade Zone"? Any tax, by definition, is an imposition on the taxed party.

It is inconceivable that the framers of the United States Constitution intended that Congress would have the power to pick and choose which taxes the States might levy on persons and property within their jurisdiction. In the Federalist Papers Alexander Hamilton wrote at length (papers 30 through 36) to justify the provisions in the Constitution giving the power of direct taxation to the Federal Government and to ameliorate the fear that the sovereign powers of the States to tax would be destroyed by that government. Hamilton's justification of the power of the Federal Government to levy a direct tax was eloquent and forceful. It is doubtful, however, that it would have turned the tide toward ratification if he had not been just as eloquent and forceful in defending the co-equal and sovereign rights of the States to impose taxes.

In the latter regard Hamilton in Paper 32 wrote as follows:

> Although I am of opinion that there would be no real danger of the consequences which seem to

> be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power; **yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution.**

THE FEDERALIST NO. 32 (Alexander Hamilton).

Had it been contemplated by the Framers of the Constitution that Congress could prohibit a general state tax on the people or property within the state merely because the tax might have some impact on commerce, it is hard to conceive of the justification that Hamilton, Madison or Jay could have set forth in the Federalist Papers which would have overcome the objections of the opponents to ratification. All taxes have an impact on commerce in one way or another and, therefore, the power to preclude state taxation under the guise of regulating commerce would be all-encompassing. The States would have been left as mere shells with no real sovereignty.

Ratification was a close thing. If the Framers had in fact intended that the Federal Government have such power over the States it probably would not have occurred.

This Court has repeatedly said that the Commerce and Import-Export Clauses were not designed to protect interstate or international commerce from paying its way. *See Michelin Tire Corp.*, 423 U.S. 276 (1976); *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978); *Complete Auto Transit*, 430 U.S. 274 (1977); and *Goldberg v. Sweet*, 488 U.S. 252 (1989).

If the tax singles out interstate or international commerce it will be struck down. *See American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987); *Maryland v. Louisiana*, 451 U.S. 724 (1981); and *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 231 (1987). But if the tax is fairly related to the commerce or property being taxed it will be upheld. *Complete Auto Transit*, 430 U.S. 274 (1977); *Michelin Tire Corp.*, 423 U.S. 276 (1976); *Washington Stevedoring*, 435 U.S. 734 (1978); and *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991).

The *Trinova* decision contains perhaps the most concise statement of the role this Court has set for itself in these cases. There this Court held as follows:

> In reviewing State taxation schemes under the Commerce Clause, we attempt "to ensure that each State taxes only its fair share of an interstate transaction." (cite omitted) We act as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax belong of right to other jurisdictions. We have always "declined to undertake

> the essentially legislative task of establishing a single constitutionally mandated method of taxation."

Trinova Corp., 498 U.S. at 386.

Since the tax in question in this case violates none of the restrictions on State taxation imposed either by the United States Constitution or this Court's opinions in the cases cited above, the provisions of §81*o*(e) can be constitutional only if Congress' plenary power under the Commerce Clause is limitless. The School Districts acknowledge that in *Garcia v. San Antonio Metro*, 469 U.S. 528 (1985) this Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), and moved from "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is integral or traditional" to a somewhat ill-defined protection afforded to whatever remains of State sovereignty by "the built-in restraints that our system provides through state participation in federal governmental action." *Id.* at 556.

It is unclear to the School Districts how the people of Texas and their Constitution are to be protected by the "system" when, as evidenced by the legislative history quoted above, the statute in question in this case was aimed specifically at Texas and only at Texas. It is clear that prior to the enactment of §81*o*(e) Texas was doing what it had the right to do — taxing property such as that involved in the current dispute. Does the fact that Texas was the only state obligated by its Constitution to levy such taxes mean that it should be deprived of such a basic right by a Congress comprised in large part of representatives from 49 other states with nothing at stake?

Even in *Garcia* this Court held "If there are to be limits on the Federal Government's power to interfere with state functions — **as undoubtedly there are** . . . ." *Garcia*, 469 U.S. at 547. That court also held as follows:

> The States unquestionably do "retain a significant measure of sovereign authority." *EEOC v. Wyoming*, 460 US, at 269, 75 L.Ed. 2d 18, 103 S.Ct. 1054 (Powell, J., dissenting). They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."

Id. at 549.

Since it is indisputable that the power of the States to levy general taxes on their people and property was an original power of the States, one must look to the extent that the Constitution has "transferred those powers to the Federal Government." *Garcia*, 469 U.S. at 549.

In *United States v. Lopez*, 514 U.S. 549, 558 (1995), this Court once again reviewed the powers transferred to Congress with respect to the regulation of commerce. In that case the Court held that there were "three broad categories of activity that Congress may regulate under its commerce power."

> . . . **First, Congress may regulate the use of the channels of interstate commerce . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce**, even though the threat may come only from intrastate activities . . . **Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce**, *Jones & Laughlin Steel*, 301 U.S., at 37, 57 S.Ct., at 624, *i.e.*, **those activities that substantially affect interstate commerce.**

Id. at 558-59.

In *Lopez* the Federal Government, in attempting to defend the statute involved, argued that (like the taxes involved here) the costs of violent crime are substantial and that they have an impact on the national economy and that it was therefore within Congress' authority under the Commerce Clause to regulate the possession of firearms within a certain distance of public schools. In response this Court held as follows:

> **We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.** See Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of §922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by any individual that Congress is without power to regulate. . . .

Id. at 564.

In striking down that statute in *Lopez* this Court was obviously retreating from reliance upon the purely structural protections offered by this Court in *Garcia* in determining how

far Congressional authority under the Commerce Clause extended. Instead of a test that basically held that Congress could do whatever it was big enough to do, this Court recognized that there must be limits.

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See *supra,* at 1629. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. **To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden, supra,* at 195, and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel, supra*, at 30, 57 S.Ct., at 621. This we are unwilling to do.**

Id. at 567-68.

Another recent opinion, *New York v. United States*, 505 U.S. 144 (1992), serves to define the limits of congressional power under the Commerce Clause.

> As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia*

> *Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 69 L.Ed.2d 1, 101 S.Ct. 2352 (1981) . . .

Id. at 161.

> . . . While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States . . .

Id. at 162.

> **In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.**

Id. at 166.

In the most recent case addressing the issue of State sovereignty this Court has once again made it clear that there are limits beyond which the Federal Government may not go, *Printz, Sheriff/Coroner, Ravalli County, Mont. v. United States*, __ U.S. __, 117 S. Ct. 2365 (1997). In that case the court struck down portions of the "Brady Act" which required local law enforcement officials to perform background checks on handgun purchasers. In doing so the Court held as follows:

> It is incontestible that the Constitution established a system of "dual sovereignty." (Cites omitted) Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison).
>
> Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, Section(s) 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
>
> The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict . . . (Cites omitted)

Id. at 2376-77.

> Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than (as Judge Sneed aptly described it over two decades ago) by "reduc[ing] [them] to puppets of a ventriloquist Congress," *Brown v. EPA*, 521 F.2d, at 839. It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. See *Texas v. White*, 7 Wall, at

> 725. It is no more compatible with this independence and autonomy that their officers be "dragooned" (as Judge Fernandez put it in his dissent below, 66 F.3d, at 1035) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

Id. at 2381.

Isn't Texas in fact being "dragooned" by the act challenged in this cause? It is obligated to provide governmental services to the Industries but prohibited from recovering compensation for those services from those Industries. This requirement clearly commandeers the State and local governments into the active but uncompensated support of the federal regulatory scheme incorporated into the "Foreign Trade Zone Act." This certainly appears to be the exact sort of regulation of the States rather than of individuals that the *New York* opinion condemned. Furthermore, depriving a State of the revenues it is entitled to as part of the federal regulatory scheme is just as damaging to the State, if not more so, than commandeering its revenues and resources to further that scheme. This is exactly the type of action so recently condemned in *Printz* by this Court.

CONCLUSION

This case presents a question of exceptional importance — whether Congress has the power, regardless of how limited its current application may be, to place restrictions on State taxation by statute which are not imposed on State taxation by the words of the United States Constitution itself. If the authority of Congress under the Commerce Clause is so broad as to allow it to dictate to the states the method and mode of taxation they may or may not employ, then the system of dual sovereignty envisioned by the Framers of the Constitution exists only at the pleasure of Congress.

Accordingly, the School Districts respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JANUARY 22, 1998

DEER PARK INDEPENDENT SCHOOL DISTRICT; Galena Park Independent School District; Sheldon Independent School District, Plaintiffs-Appellants,

v.

HARRIS COUNTY APPRAISAL DISTRICT; et al., Defendants,

Harris County Appraisal District; Shell Chemical Corporation; Shell Oil Company; Marubeni Tubulars Incorporated; Mitsui Tubular Products Incorporated; Lyondell-Citgo Refining Company Limited; Crown Central Petroleum Corporation; Vinson Supply Company; Siderca Corporation, Defendants-Appellees.

GALENA PARK INDEPENDENT SCHOOL DISTRICT, Plaintiff-Appellant,

v.

Harris County Appraisal District; et al., Defendants,

HARRIS COUNTY APPRAISAL DISTRICT; Marubeni Tubulars Incorporated; Mitsui Tubular Products Incorporated; Lyondell-Citgo Refining Company Limited; Crown Central Petroleum, Defendants-Appellees.

SHELDON INDEPENDENT SCHOOL DISTRICT, Plaintiff-Appellant,

v.

Appendix A

HARRIS COUNTY APPRAISAL DISTRICT (Central); et al., Defendants,

Harris County Appraisal District (Central); Vinson Supply Company; Siderca Corporation, Defendants-Appellees.

No. 97-20508
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1998.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before REYNALDO G. GARZA, SMITH and BENAVIDES, Circuit Judges.

PER CURIAM:

This case comes from a final summary declaratory judgment of the United States District Court for the Southern District of Texas, Judge Lynn Hughes, presiding. This case was decided on cross-motions for summary judgment. The district court granted summary judgment in favor of the Defendants-Appellees, the Harris County Appraisal District, et al. (the "Companies"). The Plaintiffs-Appellants, the Deer Park Independent School District, et al. (the "School Districts") timely appealed, and the matter now lies before this panel.

Appendix A

Background

The School Districts[1] filed suit in the district court on September 30, 1996, seeking a declaratory judgment stating that 19 U.S.C. § 81o(e) is unconstitutional. This statute grants exemptions from state and local ad valorem taxes on property to businesses located inside of Foreign Trade Zones ("FTZs"). Specifically, the School Districts alleged that these exemptions unconstitutionally deprived them of tax revenue.

The Companies[2] are various corporations with operations in the FTZs. Both sides have stipulated that the property involved in this dispute is either (i) tangible personal property imported from outside the United States and held in an activated FTZ for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, or (ii) tangible personal property produced in the United States and held in an activated FTZ for exportation, either in the above form or as altered by the above processes. But for the operation of § 810(e), all or a significant part of the property would be taxable by the School Districts.

---

1. The School Districts are: The Deer Park Independent School District, the Galena Park Independent School District, and the Sheldon Independent School District. The Companies asked that the appeal of the Sheldon Independent School District be dismissed for want of jurisdiction. We do not pass on that point at this time, because it is moot, given the outcome of this case.

2. The Companies are: the Lyondell-Citgo Refining Company, Ltd., the Crown Central Petroleum Corporation, the Shell Oil Company, the Shell Chemical Corporation, the Siderca Corporation, the Vinson Supply Company, Mitsui Tubular Products, Inc., and Marubeni Tubulars, Inc. The Harris County Appraisal District was included as a defendant in this suit because of its role as tax assessor.

Appendix A

Several related cases were consolidated into this one, and the parties stipulated to the relevant facts. Both sides submitted motions for summary judgment, and on May 16, 1997, the district court made its ruling. The district court granted summary judgment in favor of the Companies, and denied the School Districts' motion for summary judgment.

The School Districts timely appealed, claiming that the district court erred in granting summary judgment in favor of the Companies. They argue that § 81*o*(e) is an unconstitutional exercise of Congress' power under the Commerce Clause, and violates the Tenth Amendment and the Guarantee Clause of the Constitution. Upon review of the pleadings, briefs, and record on file, we find no reversible error and affirm the decision of the district court.

Standard of Review

Summary judgment is appropriate if the record discloses that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.Proc. 56(c); *Sims v. Monumental General Ins. Co.*, 960 F.2d 478, 479 (5th Cir.1992). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). We review the facts drawing all inferences in favor of the party opposing the motion. *Reid v. State Farm Mutual Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir.1986).

In addition to the aforementioned general procedural matters, we review challenges to the validity of a Congressional

exercise of power under the Commerce Clause using the following standards. The burden for the challenger in cases such as this is high. This Court must determine only (1) whether a rational basis exists for finding that the regulated activity affects interstate commerce, and (2) whether the means chosen by Congress were "reasonably adapted to the end permitted by the Constitution." *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 276, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981). The Commerce Clause power is complete in itself and is only limited by those limits prescribed in the Constitution. *Id.*

Congress' regulatory power under the Commerce Clause may be used to regulate the use of the channels of interstate commerce, Congress may protect and regulate the instrumentalities of interstate commerce (including people or things in interstate commerce), and Congress may regulate those activities having a substantial relation to interstate commerce. *U.S.* v. *Lopez,* 514 U.S. 549, 556, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 626 (1995). While the states do retain broad powers under the Constitution, they "only do so to the extent that the Constitution has not divested them of their original powers and transferred these powers to the Federal Government." *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 549-550, 105 S.Ct. 1005, 1016-17, 83 L.Ed.2d 1016 (1985). The right to regulate foreign and interstate commerce is one of powers expressly granted to the federal government by Art. I, § 8, cl. 3 of the Constitution.

Analysis

While all the claims are related, the primary contention of the School Districts is that Congress did not have power under

the Commerce Clause to enact and enforce § 81*o*(e), and as a result, the statute should be declared unconstitutional. We have already stated the broad extent of Congress' powers under the Commerce Clause, as well as the fact that the standard of review is whether there was a rational basis for Congress' actions and whether the means chosen were reasonably adapted to the ends. *Hodell* 452 U.S. at 276, 101 S.Ct. at 2360.

Congress' actions in this case were rational and pass muster. First of all, there can be no doubt that the activities in the FTZs constitute foreign, and by extension, interstate commerce, so they are within the purview of the Congress. Next, it is completely rational to believe that the imposition of ad valorem taxes on the property in the FTZs would affect interstate and foreign commerce, and that forbidding such taxes would provide uniform treatment of FTZs throughout the country. Such uniformity in foreign commerce is a well-recognized federal interest. *Japan Line, Ld.. v. County of Los Angeles,* 441 U.S. 434, 448-449, 99 S.Ct. 1813, 1821-1822, 60 L.Ed.2d 336 (1979). Further, in enacting § 81*o*(e), Congress explicitly found that the aims of the original act of Congress which created FTZs were being frustrated by non-uniform local and state ad valorem taxes. Congress believed, rationally, that this negatively affected interstate and foreign commerce, and fashioned a reasonable response.

Also this law is of importance to Texas because the Texas Constitution specifically lists the permissible exemptions from ad valorem taxation, and property within FTZs is not on the list. For this reason, Texas Senators Lloyd Bentsen and John Tower, in conjunction with Texas Congressmen Jim Wright and Jack Brooks, sponsored this law. This law was passed to help Texas, by encouraging industry, and is not a type of oppression or "dragooning" of the state, as the School Districts contend.

Further, the plenary power granted to Congress under the Commerce Clause includes the power to protect interstate and foreign commerce from taxation. *State Bd. of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 456, 82 S.Ct. 1380, 1383, 8 L.Ed.2d 620 (1962). This power to grant or withhold protection from regulation or taxation "is so complete that its ideas of policy should prevail." *Id.* Congress' actions were well within its power under the Commerce Clause, and pass muster under the standards listed.

The School Districts also claim that § 81*o*(e) violates the Tenth Amendment. As stated previously, the Tenth Amendment's reservation to the states of power not conferred on the federal government in no way inhibits the activities of the federal government in situations in which a power has been so conferred. *See Garcia*, 469 U.S. at 549-550, 105 S.Ct. at 1016-1017. The explicit granting of power to the Congress, in regard to its right to regulate foreign and interstate commerce, in conjunction with the Supremacy Clause, clearly gives Congress power over this situation. *See e.g., Seniors Civil Liberties Ass'n, v. Kemp*, 965 F.2d 1030, 1034 (11th Cir.1992).

Further, historically, Congressional prohibitions on state taxation have been upheld over Tenth Amendment challenges. For example, even when *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) was the lead Supreme Court case on these matters,[3] the Supreme Court upheld a federal law which preempted a state tax that discriminated against the sale of electricity outside the state. *Arizona Public Service Co. v. Snead* 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106 (1979). The Supreme Court rejected the

3. *National League of Cities* was overruled by *Garcia*, 469 U.S. at 557, 105 S.Ct. at 1020.

argument that Congress lacked authority under the Commerce Clause to regulate state taxation, stating that Congress had broad power in this sphere, had a rational basis for finding that the tax interfered with interstate commerce, and the means selected were reasonable to achieve Congress' ends. *Id.* at 150, 99 S.Ct. at 1634. More recent cases have given support to this proposition as well. For example, in *New Jersey v. Consolidated Railroad Corp.*, 690 F.Supp. 1061 (Reg'l Rail Reorg.Ct. 1988), the court held that Congress could exempt Conrail (a privately owned railroad) from taxation, rejecting the state's Tenth Amendment claim.

Congress acted well within its powers under the Commerce Clause in this case, its belief that this affected interstate commerce was rational, and the means it used to achieve its goals were reasonable and appropriate. Therefore, the School Districts' Tenth Amendment claims fail.

As a final argument on this point, the School Districts claim that cases such as *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) and *Printz, et al v. United States, — U.S. —,* 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), somehow support their Tenth Amendment claim. This assertion is incorrect. Those cases involve an act of Congress which essentially hijacked the administrative apparatus of state and local government to help achieve Congress' ends. This case is not an example of such a Congressional overreach, so this argument fails as well.

The School Districts also claim that § 81*o*(e) violates the Guarantee Clause of the Constitution in that it deprives the states of a republican form of government. This claim is not only incorrect, it is absurd. First of all, the Supreme Court has held

that challenges to Congressional action under the Guarantee Clause are not justiciable. *See Baker v. Cars,* 369 U.S. 186, 224, 82 S.Ct. 691, 713, 7 L.Ed.2d 663 (1962); *O'Hair v. White,* 675 F.2d 680, 684 n. 5 (5th Cir.1982). Also, the School Districts do not explain the merits of their claim, silence which warrants rejection. Further, at least as of today, Texas is governed by a freely elected legislature and executive, not a monarchy, military dictatorship, or any other type of government which would offend the Guarantee Clause of the Constitution. Unless and until that fact changes, this claim is an absolute dead letter.

Conclusion

Based on the foregoing, we find no reversible error in the decision of the district court, which granted summary judgment in favor of the Defendants-Appellees, and held that § 81*o*(e) is constitutional. Therefore, we AFFIRM the decision of the district court.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED MAY 16, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-96-3256

DEER PARK, GALENA PARK and SHELDON INDEPENDENT SCHOOL DISTRICTS,

Plaintiffs,

versus

HARRIS COUNTY APPRAISAL DISTRICT, SHELL CHEMICAL CORPORATION, SHELL OIL COMPANY, MARUBENI TUBULARS, INC., MITSUI TUBULAR PRODUCTS, INC., LYONDELL-CITGO REFINING CO., LTD., CROWN CENTRAL PETROLEUM CORP., VINSON SUPPLY CO., SIDERCA CORPORATION, and MARUBENI AMERICA CORPORATION,

Defendants.

Opinion on Judgment

1. *Introduction*

Three school districts located near the port of Houston sued companies in foreign trade zones for property taxes. A federal statute allows companies in the zones an exemption from state and local *ad valorem* taxes on personal property. The school districts claim that the law unconstitutionally intrudes on their

authority as components of the federal system of divided power and unconstitutionally extends the national authority over foreign trade.

The school districts cannot collect taxes from these companies because the exemption statute's purpose and effect is directly and substantially related to an express power that the Constitution confides to the national government. A constitutional statute supersedes contrary provisions of the Texas Constitution and laws.

2. *Foreign Trade Zone.*

A foreign trade zone is an area that is physically within the United States, but it is treated as if it were outside of the United States territory for import duty purposes. Since 1934, federal law has permitted importation of goods into zones without payment of customs duties until they are transferred from the zone into the general domestic economy. If the products are shipped to another country, then no American duty is charged. *See* The Foreign Trade Zones Act of 1934, 19 U.S.C. §§ 81a-81u (1996). The goods — usually raw materials or parts — can then be assembled, stored, and processed by the company in the zone. The purpose of a zone is the economic benefit to the domestic economy of American companies' using local workers, supplies, and other resources more frequently than would have been the case if the companies had to pay United States duties before working with the goods. A company that buys equipment to process these tax-exempt goods will owe the school district taxes on the machines. *See A.T. Cross Co. v. Sunil Trading Corp.*, 467 F. Supp. 47, 50 (S.D.N.Y. 1979).

3. *The 1983 Expansion.*

Ironically, the principal congressional sponsors of an expansion of the law in 1983 were Texas Senators John Tower and Lloyd Bentsen and Texas Congressmen Jim Wright and Jack Brooks. Their bill extended the exemption from customs duties to include an exemption from state and local *ad valorem* taxes. The statutory exemption says:

> Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, . . . assembly, . . . or processing, and tangible personal property produced in the United States and held in a zone for exportation . . . shall be exempt from State and local *ad valorem* taxation.

19 U.S.C. § 81*o*(e).

The bill was introduced to cure a "unique problem in the State of Texas in which the local taxing jurisdiction does not have the authority to exempt tangible personal property in a [foreign trading zone] from taxation due to the State constitution." H.R. Rep. No. 267, 96th Cong., 1st Sess 35-36 (1983). Texas's constitution specifies articles that are exempt from tax, and no other exemptions may be allowed by local governments. The legislators "expected that Federal law would preempt State law in this case." *Id.*

4. *Texas & Property Taxes*

The Texas Constitution requires that all property be taxed unless the property has been allowed an exemption in the constitution itself. TEX CONST. art. VII, §§ 1, 2, and 3. Until

recently (in historical terms) Texas was dependent on *ad valorem* taxation of property. These taxes were administered through independently elected county officers who appraised the property, assessed the taxes, and collected the taxes for the county and state. The state had no separate appraising or collecting officers. Under these circumstances Texas needed to keep locals from allowing exemptions that would have the effect of shifting part of that county's state tax burden to other counties.

Texas stopped using *ad valorem* taxes for direct state revenue in 1968, leaving that source to local governments. This shift was possible because in 1961 the state had adopted a statewide sales tax, among other taxes. *See* TEX CONST. art. VIII, § 1-*e*(1) (abolition of *ad valorem* taxes); *see generally* Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law,* 51 Tex. L. Rev. 885 (1973).

The administrative cost and abuses of each city and school district having its own appraisal process in addition to the county's system led the state to compel all taxing authorities within a county to use a single appraisal authority. The Harris County Appraisal District serves as the sole source of property valuations for tax purposes. Because it did not list a taxable value for these companies' stocks of goods, the school districts sued to compel it to appraise the property held by these companies so that they may assess taxes based on that value. The appraisal district has admitted that it will obey the law and that it has no direct interest in the outcome of the case, with the companies being the real parties in interest.

5. *Commerce Clause, Zones & the Constitution.*

The districts say that the exemption of goods present within the district — even if they are exempt from federal taxes — are

indistinguishable from other goods in the districts. The districts' position is that: The use of the commerce power to reach into a unit of local government to exempt particular goods based on their past or future locations (a) extends the authority of the government beyond the constitutional purpose of the commerce clause and (b) impedes the constitutional function of regional and local governments as a counter force to the national government.

A government act does not violate the constitution, if:

- By its terms or impact, the act has an objective that relates rationally to a governmental power entrusted to that government;

- The act employs a permissible means;

- The actual accomplishment of the objective and significance of the objective justify the nature and extent of the resulting inhibition of a component of liberty;

- The act has been adopted and applied with procedural regularity; and

- The act distinguishes between affected and non-affected persons defensibly because the criterion between them is logically connected to the objective.

As Chief Justice John Marshall said, "Let the end be legitimate, [then] all means that are appropriate . . . to that end, which are not prohibited [by] the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).

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A. *Entrustment.*

The Constitution confides the subject of foreign commerce to the national government. Congress is allocated authority over commerce "among nations" and a monopoly on import duties. U.S. CONST. art. I, § 8. Further, "No state shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . ." U.S. CONST. art. I, § 10. Further, "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. 1, § 8. This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1. 196 (1824).

B. *Permissible Means.*

The Constitution restricts congress's power over taxes several ways, like tax bills must originate in the house and import duties must be uniform nationally, but no provision expressly — comparable, say, to the ban on "takings" — disallows the technique of tax exemption from the tools congress may use to effect its policy decisions.

C. *Rational Relation.*

To comply with its obligations under the Constitution, the national government must select a means that is plausibly related to the end that the Constitution has said it may address. It is not obliged to select a means that is the best available, single-purposed, or proven. Even the search for a plausible relation is not an evaluation among the levels

of effectiveness; it is, rather, the search for a violation of constitutional limits on the scope of the national government by use of a power for non-national purposes. Irrationality suggests deceit, not insanity.

The actual economic effects locally or nationally are probably unknowable. Deer Park loses the revenue from the zone property, but it gets increased revenue from rise in demand for houses and other business properties, if it works. *See generally* Robert G. Lynch, *Do State & Local Tax Incentives Work?*, ECON. POL'T. INSTITUTE (1996); Joseph P. Phillips & Ernest P. Gross, *The Effect of State and Local Taxes on Economic Development: A Meta-Analysis*, 62 SOUTH. ECON. J. 320 (1995). Although the goods are tax exempt, the new equipment a company acquires to process the goods is added to Deer Park's source of revenues. At least the national government defers or forgoes its taxes along with depriving the districts; this uniformity suggests an absence of malice. "Foreign trade zones are valued because they actually promote domestic industry and create jobs . . . [T]axation of goods in foreign trade zones could arguably harm domestic industry . . ." *R. J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 153 n.22 (1986).

D. *Taxes.*

Whatever the particular merit of the plan as economic stimulation, exemption from local tax has long been a tool of building a national economy. The Constitution itself bans local tax barriers to interstate and foreign trade in the form of customs duties. *See* U.S. CONST. art. I, § 10.

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In the absence of a statute, goods in foreign commerce although present in the territory of the United States are free of local taxes. *See Xerox Corp. v. County of Harris, Texas* 459 U.S. 145 (1982); *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 679 (1945).

E. *Liberty Component: Federalism.*

This federal statute could adversely affect individual liberty through its shifting the constitutional balance of power between the aggregate state and local governments and the national government. In American political discourse, the arrangement of governmental power among different levels and regions is called federalism. A significant shift in the relation between the levels could disrupt the constitutional machinery, violating the implicit principle of balance through federalism.

Excluding sources of revenue could be done so that the local sub-unit of the state was impotent. With it local administrative units crippled, the state could be eviscerated. While this is true and may occasionally seem likely, this particular statute will not cause the collapse, so it is hypothetical. Excluding the property immunized by the foreign trade zones, Deer Park had a valuation of $541 million of inventories alone in 1996, generating almost $8 million of tax revenue; Galena Park had a valuation of inventories of $555 million in 1996, generating even more tax revenue. *See Taking Stock of Inventory Taxes*, FISCAL NOTES (Texas Comptroller of Public Accounts), March 1997, at 6.

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F. *Liberty Component: Republican Guaranty.*

The school districts have urged that the national government has breached its duty to the state through the districts because the Constitution says the "United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. CONST. art. IV, § 4. Ordinarily, a guaranty would be protection from the acts of some third-party and not from the guarantor itself. The text could be understood to mean that the national government guarantees that it will not destroy the states' republican governments by its own excesses, but the constitutional role of the states is balance through federalism, which does not require republican states. A monarchical Nebraska could counter national power.

If a state's government did not observe the limits on its power that republicanism requires, its imposition on its people would require a response by the national government. The constitutional guaranty says that the national government will assist the people of a state in maintaining their right to a state administration whose power is derived "from the consent of the governed." Rather than a people petitioning Washington to restore the state's republican institutions, we have a state-created government objecting to a reduction of taxes on its people.

The companies argue, with much legal "authority" on their side, that the guaranty required by the Constitution of the United States for the benefit of the people of the states cannot be enforced in court. The occasion to decide whether to enforce the Constitution's limits on the character of state governments does not now arise, but an unenforceable limit

is no limit, and the text of the Constitution is mostly keel and little sail.

The school districts seek shelter from the national omnipresence in the reservation of the power to the states and people that the people did not actually allocate to the national government in the Constitution. *See* U.S.CONST. amend. X. Even if the reservation in the Tenth Amendment restates the implication of the restricted grants that precede it, our experience has shown that the categories of grant have become infinitely expandable; the founders denied a possible inference that there was a quantum of power floating free for acquisition by the national government. Since this statute fits squarely within one of the express grants of power, the reservation's express vesting of residual authority in the people is not implicated.

The form of government may seem like a lawyer's hyper-technicality, but our Constitution restricts power by allocating it to specific parts of the apparatus and by sheer prohibitions. Other than the implicit policy of preserving individual liberty through limited government, the Constitution is about methods and process rather than policies and ends. The structure of the machinery is the constitution; what it constitutes is a structure. It constitutes no policy about postal deficits or tax level. The preservation of the states as a counter-weight to the national government is essential to preserving the Constitution.

G. *Affected Persons.*

The districts say that they are adversely affected because they are forced to forgo revenue to support national

goals that other districts collect. They say that there is no defensible way to distinguish between school districts hurt by this act and those that are not.

The distinction among districts is rationally purposeful because the act exempts a particular class of goods defined by geographical areas that are not school-district specific. Some of a district's area may be in a zone, some may not, all may be, or all may not; the area is chosen for its likelihood of having the ability to attract foreign trade. If a foreign trade zone were created in a school district that had no foreign commerce, then none of the goods present at tax time would qualify for the exemption.

The relation between the zone and district is adventitious, but the relation between the zone and foreign trade is direct.

6. *Texas Tax Code.*

Indeed, the right of Congress to preempt state taxation, whether under the Commerce Clause or under another constitutional grant of authority, is recognized by the Texas Tax Code itself. The code confirms that "[p]roperty exempt from *ad valorem* taxation by federal law is exempt from taxation," recognizing the federal government's power to create exemptions. TEX. TAX CODE ANN. § 11.12 (1992). The Texas legislature itself recognized Texas's public interest in encouraging uniform application of law, as well as foreign and other trade with Texas citizens, by expressly acknowledging to federal statutory exemptions from local *ad valorem* taxation.

Texas adopted a statute allowing local districts at their option to exempt goods being processed for export. This statute

may be broader than the current federal exemption, but whether it is wholly moot or still useful is irrelevant to the dominance of the federal policy. *See* TEX. TAX COD ANN. § 11.251 (1992) (the option for local taxing jurisdictions exempts goods warehoused in Texas for less than 175 days that then leave the state).

7. *Conclusion.*

Under its authority over international commerce, the national government created foreign trade zones for goods to be exempt from local *ad valorem* taxes while processed in the United States; that exercise of constitutional authority complied with the limits of that power itself and the limit on its intrusion on state governments' partial autonomy. When the national government constitutionally exercises its authority, the national policy supersedes state and local rules that conflict. *See* U.S. CONST. art. VI, § 2 (Supremacy Clause). In the context of state taxation, "the power of congress to grant protection to interstate commerce against state regulation or taxation is so complete that its ideas of policy should prevail." *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962) (citations omitted).

The Harris County Appraisal District has constitutionally applied the federal exemption to the Deer Park, Galena Park, and Sheldon Independent School Districts. The companies do not owe *ad valorem* taxes on their unimported goods.

Singed May 15, 1997, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C — STIPULATION OF FACTS DATED JANUARY 17, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-96-3256

(CONSOLIDATED WITH
H-96-2786 AND
WITH H-96-2959)

DEER PARK INDEPENDENT SCHOOL DISTRICT, GALENA PARK INDEPENDENT SCHOOL DISTRICT and SHELDON INDEPENDENT SCHOOL DISTRICT,

Plaintiffs

VS.

HARRIS COUNTY APPRAISAL DISTRICT, SHELL CHEMICAL CORP., SHELL OIL CO., MARUBENI TUBULARS, INC., MITSUI TUBULAR PRODUCTS, INC., LYONDELL-CITGO REFINING CO., LTD., CROWN CENTRAL PETROLEUM CORP., VINSON SUPPLY CO., and SIDERCA CORP.

Defendants

STIPULATION OF FACTS

All counsel have consulted and consented in the matter and present the following stipulation of facts as to which the parties agree there are no genuine issues to be tried:

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1. Property taxes levied by school districts on property located within their respective boundaries comprise a significant portion of the total expenditure on public education in Texas.

2. The Plaintiffs are independent school districts existing by virtue of TEX. CONST., art. 7 § 1 and TEX. ED. CODE. ANN., Title 2 and are political subdivisions of the State of Texas.

3. The information contained in the "Data Sheets" prepared at the Court's direction by both Plaintiffs and Defendants is incorporated into this Stipulation of Facts.

4. The facts set forth in paragraphs 19-21, 24-33 and 37-42 of Plaintiffs' First Amended Complaint for Declaratory Judgment with respect to the identification and valuation of the properties exempted are correct. The applicable tax rates for the relevant tax years and taxing jurisdictions are as follows:

The tax rates per $100.00 of value for Deer Park Independent School District for 1995 and 1996 are $1.53 and $1.53 respectively. The tax rates per $100.00 of value for Galena Park Independent School District for 1994, 1995 and 1996 are $1.5868, $1.5868 and $1.6168, respectively. The tax rate per $100.00 of value for Sheldon Independent School District for 1996 is $1.52.

5. All of the property involved in this dispute was located in an activated foreign trade zone on January 1 of each year involved in this dispute, and all such property was either (i) tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading,

cleaning, mixing, display, manufacturing, or processing, or (ii) tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes.

6. Deer Park Independent School District filed a timely challenge petition as required by Section 41.04, Texas Tax Code, timely filed a notice of appeal as required by Section 42.06, Texas Tax Code and timely filed suit with respect to the property referenced in paragraphs 19-21 of Plaintiffs' First Amended Complaint for Declaratory Judgment.

7. Galena Park Independent School District filed a timely challenge petition as required by Section 41.04, Texas Tax Code, timely filed a notice of appeal as required by Section 42.06, Texas Tax Code and timely filed suit with respect to the property referenced in paragraphs 24-33 of Plaintiffs' First Amended Complaint for Declaratory Judgment.

8. Sheldon Independent School District did not file a timely challenge petition as required by Section 41.04, Texas Tax Code and did not timely file a notice of appeal as required by Section 42.06, Texas Tax Code, with respect to the property referenced in paragraphs 37-42 of Plaintiffs' First Amended Complaint for Declaratory Judgment.

9. All or a significant portion of the property involved in this dispute would be taxable by the Plaintiffs were it not for the exemption created by the provisions of 19 U.S.C. §81o(e).

10. The property involved in this dispute is exempt from taxation by the Plaintiffs unless the provisions of 19 U.S.C. §81o(e) are unconstitutional.

Appendix C

Dated: January 17, 1997.

Respectfully submitted,

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